

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Criminal Appeal No. 106 of 2006

Date of decision :-13.06.2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-13.06.2007

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

**Criminal Appeal No. 106 of 2006
(Old No. 1339 of 1989)**

1. Madan S/o Jungal		
2. Fulla S/o Jungal		
Both R/o village Manakheri		
Police Station Manglaur		
District Haridwar		
3. Ratipal S/o Ballan		
R/o village Mannakheri		
P.S. Manglaur		
District Haridwar		...Appellants
	Versus	
State		... Respondent

Delivery of Judgment :13th June, 2007

Mr. R. P. Nautiyal learned Advocate with Sri Mohd. Azim learned counsel for the appellants.

Mr. Amit Bhatt, learned Addl. G.A. for the respondent-State.

**Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.**

Per Hon'ble J.C.S. Rawat, J.

1. This Criminal Appeal has been directed against the judgment and order dated 30.05.1989 passed by Shri A. L. Verma, the then Addl. Sessions Judge, Roorkee in S.T. No.29/1988 State Vs. Madan & others, whereby the appellants were convicted and sentenced to undergo imprisonment for life under section 302/34 IPC.

2. The facts, in nutshell, are that on 18.07.1987 at about 10:30pm Rohtash and Vedpal were coming to their village Manakheri, P.S. Manglaur from Lehboli. When they reached near the house of Jagdish Jheever, all of a sudden, the appellants Madan, Fulla and Ratipal armed with '*Tabbal*', '*Ballum*' and '*lathi*' respectively emerged there and surrounded Vedpal with intention to

assault him. All the appellants started assaulting Vedpal with their weapons. Rohtash rushed to the house of Ismpal (brother of Vedpal) where Dharmendra Pal and Ishmpal met him. Rohtash narrated the entire story of the incident to Dharmendra Pal and Ishmpal. Rohtash, Dharmendra Pal and Ishmpal immediately reached at the scene of occurrence and saw the appellants beating Vedpal. Vedpal jumped towards the yard of Jagdish Jheever, but the accused persons also reached there and assaulted him there also. Surajmal and Gyan Singh also reached at the spot immediately after the arrival of Ishmpal, Dharmendra Pal and Rohtash. The appellants fled away from the place of occurrence and Vedpal succumbed to his injuries at the spot. The witnesses saw the accused persons in the light of torch. Thereafter, a written report Ex.ka.7 was lodged by Dharmendra Pal at 12:50am in the intervening night of 18/19.07.1987. On the basis of written report Ex.ka.7, a Chick F.I.R. Ex.Ka.8 was prepared and necessary entry was made in the general diary. S.I.-V. K. Sharma PW6, Investigating Officer started the investigation and sent the dead body for postmortem after preparation of the inquest report. The I.O. prepared the site plan. He also recorded the statement of the witnesses. He also took the sample of blood stained earth and plain earth from the place of occurrence. After completing the investigation, the Investigating Officer submitted the chargesheet before the court.

3. After submission of chargesheet the appellants-accused were committed to the court of sessions for trial and the trial court framed charges against the

accused persons. They denied the charges levelled against them and claimed their trial.

4. The prosecution in support of its case examined as many as seven witnesses. Dr. T. S. Parmar PW1 is the Medical Officer, who conducted the postmortem of the dead body of the deceased. Krishan Dutt Gautam PW2 was a formal witness, who proved the report. Ishmpal PW3, Rohtash PW4 and Dharmendra Pal PW5 are the eye-witnesses of the incident. Dharmendra Pal PW5 was also the informant of the case. V.K. Sharma PW6 is the Investigating Officer of this case. After completing the investigation, he submitted the chargesheet Ex.Ka.10. Head Constable Dayachand PW7 was also a formal witness.

5. The accused persons were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated in this case.

6. The learned trial court on appreciation of the evidence held the appellants guilty and convicted and sentenced them as mentioned above.

7. We have heard learned counsel for the appellants and learned Add. G.A. for the respondent-State. Perused the record carefully.

8. At the outset, it needs to be mentioned here that it is not disputed that the deceased Vedpal died on account of the injuries sustained by him on the date of occurrence. Dr. T. S. Parmar (PW1), Medical Officer

Conducted the postmortem of deceased-Vedpal on 20.07.1987 at 10am and found following ante-mortem injuries on the person of the deceased.

- (i) Incised wound 10cm x 2cm x brain deep in the top of head extending to left side and 6cm above the left ear with # (fracture) of left frontal bone.
- (ii) Incised wound 11cm x 3cm x brain deep on left side of head extended downward to back of neck with # of left temporal & parital bone tailing down words.
- (iii) Incised wound 2cm x 1cm x muscle deep on left side just above the left color bone.
- (iv) Abrasions 9cm tailing on left side of chest extending downwards from injury no.2.
- (v) Incised wound 7cm x 2cm x bone deep on the back of right shouder tailing downword.
- (vi) Incised wound 2cm x 1cm x muscle deep on the back side 7cm below the injury no.5.
- (vii) Incised wound 2cm x 0.5cm x muscle deep on the back of neck.
- (viii) Incised wound 2cm x 0.5cm on the back of left side 8cm obliquely from left S.M. joint
- (ix) Incised wound 2cm x 1cm x muscle deep on the back of head below the occipital protuberance.

In the opinion of Medical Officer, the death of the deceased was caused due to shock and haemorrhage resulting from the ante-mortem injuries sustained by him. Thus, it is amply established that deceased-Vedpal met a homicidal death on account of injuries sustained by him.

9. It is admitted case of the parties that the appellants namely Madan and Fulla are real brothers and the appellant Ratipal is also related to Madan and

Fulla. The deceased Vedpal and Ishmpal are real brothers. Dharmendra Pal PW5 is the nephew of the deceased. Appellants, deceased and the eye-witnesses are resident of the same village i.e. Manakheri. As such, the parties are known to each other since before the date of incident.

10. Now, we have to consider whether the appellants-accused were responsible for causing death of the deceased. The prosecution had adduced the evidence of the eye-witnesses Ishmpal PW3, Rohtash PW4 and Dharmendra Pal PW5. Dharmendra Pal PW5 eye-witness has lodged the report of the incident. All the eye-witnesses have fully supported the prosecution version. Rohtash PW4 has stated in his evidence that on 18.07.1987 at about 10:30pm he alongwith deceased Vedpal was coming to the village from Lehboli. When they reached near the house of Jagdish Jheever, all of a sudden, the appellants Madan, Fulla and Ratipal armed with 'Tabbal', 'Ballum' and 'lathi' respectively emerged there and surrounded Vedpal and started assaulting him. Rohtash immediately rushed to Ishmpal's house situated nearby the place of incident and narrated the story about the incident to Dharmendra Pal and Ishmpal. Thereafter, Rohtash, Dharmendra Pal and Ishmpal reached at the scene of occurrence alongwith torches in their hands and saw the appellants beating Vedpal with 'Tabbal', 'Ballum' and 'lathi'. In order to save himself from the assaults Vedpal jumped in the premises of jagdish Jheever, but the appellants-accused also reached there and again assaulted him. Thereafter, the appellants fled away from the place of occurrence and Vedpal succumbed to

his injuries at the spot. Ishmpal PW3 and Dharmendra Pal PW5 have also corroborated the evidence of Rohtash PW3. They were cross examined at length, but nothing could be elicited in their cross examination to discredit their testimony. All the eye-witnesses remained consistent in their cross examination with regard to the factum of incident. There is no doubt about the presence of these three eye-witnesses at the scene of occurrence.

11. Learned counsel for the appellants contended that the trial court has lost sight of the fact that there was enmity between the appellants and the deceased. The evidence of eye witnesses should not have been acted upon. Learned Addl.G.A. for the respondent-State refuted the contention and contended that there is no infirmity in the conclusion arrived by the trial court to warrant any interference. The evidence has been analyzed in great detail and with great caution by the trial court. The appellants-accused and deceased were on inimical terms. The eye witnesses were related or known to the deceased. The appellant-Madan has stated that Ishmpal PW3 is the real brother of the deceased and Dharmendra Pal is the nephew of the deceased. The defence has also stated in the statement recorded under section 313 Cr.P.C. that Hari Ram – uncle of Rohtash gave evidence against the father of the appellant Madan and in that case the father of the appellant Madan was acquitted. He further stated that the deceased was prosecuted under section 354 IPC in which the father of the appellant Madan appeared as witness and Vedpal-deceased was convicted and released on probation. Fakira -

grandfather of the appellant Madan filed a revenue suit against Ramji Lal (father of the deceased), Birbal(father of Dharmendra Pal) and Ishmpal which was decreed against them and they were evicted from the land in dispute. The appellant Madan has further stated in his statement recorded under section 313 Cr.P.C. that his grandfather Fakira also filed a suit in the consolidation court against Birbal(father of Dharmendra Pal). He has further stated that the deceased molested Smt. Bala w/o Butta and he was charged under section 354 IPC by the police in which his father Tungal and his cousin Ratipal were nominated as witnesses. In support of his defence to show enmity between the parties following documents have been filed before the trial court:-

- (i) Ex.kha.1 – copy of the judgment dated 03.04.1987 passed by Additional Munsif Magistrate, Roorkee in Criminal Case No.223/87 State Vs. Vedpal under section 354 IPC, P.S. Manglaur.
- (ii) Ex.kha.2 – copy of the judgment dated 1.4.1971 passed by Magistrate Ist Class, Roorkee in Case No.231/69 State Vs. Fakira under section 353 IPC, P.S. Manglaur.
- (iii) Ex.kha.3 – copy of written report dated 13.07.1987 lodged by Tungal – the father of Madan against the deceased Vedpal under section 323 IPC P.S. Manglaur.
- (iv) Ex.kha.4 – copy of the decree passed by Assistant Collector, Roorkee in

case No.13/77 under section 209
Zamindari Abolition Act.

- (v) Ex.kha.5 – copy of the decree passed by the Munsif Devband in case No.342/66 Fakira Vs. Harpal Singh & others.
- (vi) Ex.kha.6 – copy of the charge against the deceased Vedpal in case no.236/87 Mahendra Vs. Vedpal under section 323, 325, 504 & 506 IPC P.S. Manglaur.

12. Perusal of the aforesaid Ex.kha.1 to 6 reveals that there was enmity between the parties. It is well settled principle of law that animosity is a double-edged sword. It cuts both sides. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last person to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge alongwith the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a sweeping generalization. Each case must be judged on its own facts. After considering the evidence of the prosecution witnesses the trial court found the evidence to be implicitly truthful and reliable. The presence of the eye-witnesses at the place of occurrence is proved. We do

not find any reason to accept the plea raised by the learned counsel for the appellants. The presence of the eye-witnesses at the place of incident was established and their evidence cannot be thrown out as unreliable or tainted merely because there was a chain of litigations between the parties. This circumstance would not warrant mechanical rejection of their testimony. The evaluation with caution was needed which has been done by the trial court as well as by us. The manner of assault as described by the eye-witnesses Ishmpal PW3, Rohtash PW4 and Dharmendra Pal PW5 was also corroborated by the medical evidence. We have read the evidence and found that whatever was stated is credible and cogent. Thus, we do not find any reason to disbelieve the entire evidence on this score alone.

13. Learned counsel for the appellants contended that the prosecution has not produced the independent witnesses to corroborate the fact of incident. It was further contended that one-Jagdish Jheever in whose premises the deceased was assaulted was not produced before the court. Surajmal and Gyan, who reached at the spot immediately after the eye-witnesses, were also not produced before the court. It was also contended that the incident took place in the village and it has come in the evidence that there were other houses situated near the place of incident, but the prosecution has not adduced the evidence of other witnesses of the locality. It was further contended that the eye-witnesses of the prosecution namely, Ishmpal PW3, Rohtash PW4 and Dharmendra Pal PW5 are related or known to the deceased. Ishmpal PW3 is real

brother of the deceased-Vedpal and Dharmendra Pal PW5 is the nephew of the deceased. It was further contended that Ishmpal PW3, Rohtash PW4 and Dharmendra Pal PW5, who are said to be the eye-witnesses of the incident, belong to 'Jat' community and the appellants-accused belong to 'Harijan' community. It was further contended that the appellants-accused are interested witnesses as they are either related or known to the deceased. It was further contended on behalf of the appellants that the prosecution could have adduced the evidence of independent witnesses who were also present at the time of incident. Learned Addl. G.A. refuted the contention. It has come in the evidence that immediately after the incident Jagdish Jheever woke up. Thus, it cannot be held that he was also the eye-witnesses of the incident. Report of the process server reveals that Jagdish Jheever had left his village and he was not traceable. It shows that the prosecution has tried its level best to produce him before the court. Therefore, it cannot be held that the prosecution tried to withhold the evidence of Jagdish Jheever. So far as the non-examination of Surajmal and Gyan Singh is concerned, Ishmpal PW3 has stated that Surajmal and Gyan Singh also reached at the spot. Moreover, it is not always necessary to multiply the evidence of the incident on the same point. It has to be seen what is the quality of the witnesses. It is the quality of the evidence and not the quantity, which is required. If the evidence available on record is otherwise satisfactory in nature and can be said to be trustworthy then increase in the number of witnesses cannot be the requirement of the case. It has now almost become a fashion that

the public is reluctant to appear and depose before the court especially in criminal cases because of varied reasons. Criminal cases are kept dragging for years to come and the witnesses are harassed lot. They are being threatened, intimidated and at the top of all they are subjected to unnecessary lengthy cross-examination. So, the witnesses avoid to come to the court. The evidence of prosecution witnesses is consistent and nothing had been elicited from their cross examination which may render their evidence unreliable. The evidence of the prosecution witnesses is credible and cogent. So far as the contention regarding the interested or related witnesses is concerned, it is true that Ishmpal PW3 and Dharmendra Pal PW5 are related to the deceased. Rohtash PW4 belongs to the same village, but the evidence of these eye-witnesses cannot be discarded on this ground alone. There is no rule of law or prudence which requires that the evidence of a close relation or interested witnesses must be discarded for the simple reason i.e. they are related to each other. We have no reason to disbelieve their testimony. Similarly, being relatives, it would be their endeavour to see that the real culprits are punished and normally they would not implicate wrong persons in the crime, so as to allow the real culprits to escape unpunished. In the case of **State of Punjab Vs. Karnail Singh** reported in **2004 SCC (Cri) p/135** the Hon'ble Apex Court has held as under:-

“8. We may also observe that the ground that the witnesses being close relatives and consequently, being partisan witnesses, should not be relied upon, has no substance. This theory was repelled by this

Court as early as in Dalip Singh v. State of Punjab reported in AIR 1953 SC 364 in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J., it was observed: (AIR p. 366:-

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in – Rameshwar v. State of Rajasthan reported in AIR 1952 SC 54 (AIR at p. 56). We find, however, that it unfortunately still persists, if not in the judgments of the courts, at any rate in the arguments of counsel.”

9. Again in Masalti v. State of U.P. AIR 1965 SC 202 this Court observed:-

“But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.”

In view of the above discussions, we do not find any force in the contentions advanced by the learned counsel for the appellants.

14. Learned counsel for the appellants further contended that prosecution has failed to establish that there was any source of light at the spot. The incident took place at about 10:30pm in the night and the prosecution has not proved the source of light for the identification of the appellants. It was submitted that it was a dark night. The deceased was coming on the road and the appellants emerged in front of the deceased and Rohtash PW4. It was further submitted that since the appellants could not have recognized the deceased-Vedpal in the dark night, hence the entire prosecution version is unreliable. It was further pointed out that it was a dark night and the appellants could not have been recognized in the dark night by the witnesses, as such the appellants are entitled to be acquitted on this score alone. It was also contended that Ishmpal PW3 has stated in his evidence that he saw the incident for about 20 seconds, whereas Rohtash has stated in his evidence that he saw the incident for about 4 seconds. It was further contended that they saw only fleeing glimpses of the appellants. Learned Addl. G.A. refuted the contention. It has come in the evidence that Rohtash PW4 had a torch in his hand. The proximity at which the assailants would have confronted with the deceased, the possibility of some light reaching there from the glow of stars and the light of torch which was held by Rohtash in his hand. The fact that the murder was committed in the premises of Jagdish Jheever and the eye-witnesses who

were also holding the torches could have had enough visibility by the light of the torch to correctly identify the assailants. Over and above those factors, we must bear in mind that the appellants-accused were known to the eye-witnesses and the deceased since before. It is also significant that the deceased and appellants-accused can be recognized by their voice also. This is not a case where the identifying witnesses had only fleeting glimpses of the accused. The parties are known to each other and as such here was no chance of making a mistake about their identity. So far as the contention that Ishmpal PW3 and Rohtash PW4 have seen the incident for about 20 and 4 seconds respectively is concerned, they are rustic villagers and they are not expected to know about the exact time. It is pertinent to mention here that when a witness appears before the court, sometimes he may not stand the test of cross examination, which may be sometimes, because he is a bucolic person and is not able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, such type of discrepancy has to be ignored. (vide **Krishna Mochi Vs. Vs. State of Bihar 2002 (6) SCC p/81**). Thus, there is no reason at all for holding that the appellants-accused were not identified at the relevant time. Therefore, the contention advance by the defence is not tenable.

15. Learned counsel for the appellants contended that the conduct of Ishmpal PW3, who was the brother of

the deceased, was unnatural because he did not come forward to rescue his brother and he remained silent at the time of incident. If he was present at the time of incident, it was his natural conduct to rescue his brother. It was further contended that the conduct of PW3 leads to take an inference that he was not present at the time of incident. Learned Addl. G.A. for the respondent-State refuted the contention. The appellants were carrying '*Tabbal*', '*Ballum*' and '*Lathi*' in their hands. The complainant party was unarmed and there is no set of rules regarding the natural reaction. Therefore, it is fully justified in holding that the evidence of the prosecution witness cannot be disbelieved for not having intervened in the fight as there were three assailants who were armed with weapons. Human behaviour varies from person to person. Different people behave and react differently in different situations. Human behaviour depends upon the facts and circumstances of each case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, some become speechless and some stand uprooted from the spot. There is no set of rules of natural conduct. In the case of **Ashok Kumar Pandey Vs. State of Delhi 2002 (4) SC 76**, the father of the deceased was eye-witness of the incident and he was unarmed. The father of the deceased heard cries of his daughter whereupon he immediately rushed towards the place of occurrence and found there the accused was inflicting stab wounds on his daughter with a knife while she was bleeding profusely. He also saw his granddaughter lying injured

on the ground bleeding. The accused came towards him in a state of anger with knife in his hand and the eye-witness retraced his steps. At this stage, the accused ran away from the place of occurrence. The eye-witness then raised alarm. It was pointed out that the father of the deceased saw the accused inflicting injuries in his daughter and he did not take steps to rescue them. It was submitted that the conduct of the eye-witness was unnatural, which shows that he was not present at the place of occurrence. In these circumstances of this case, it was held by the Hon'ble Supreme Court that it cannot be said to be unnatural conduct if he could not take steps to save the life of his daughter as he being unarmed, as an ordinary normal human being, could not have taken risk of his life at the hands of the accused, which was so imminent. Therefore, the contention advanced by the defence is not tenable.

16. Learned counsel for the appellants further contended that there are contradictions and exaggerations in the testimony of the prosecution witnesses. Learned counsel for the appellants-accused tried to point out certain contradictions in the testimony of the witnesses. Learned Addl. G.A. refuted the contention. We have gone through the entire evidence and the contradictions pointed out by the learned counsel for the appellants. The normal discrepancies in evidence are those which are due to normal errors of observations, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be.

Material discrepancies are those which are not normal and not expected from the normal person. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. (vide **Krishna Mochi Vs. Vs. State of Bihar 2002 (6) SCC p/81**). After considering the evidence of Ishmpal, Rohtash and Dharmendra Pal in toto, we found the evidence to be implicitly truthful and reliable. Though their evidence was attempted to be shown as doubtful, we do not find any reason to accept the plea. Their presence at the place of incident was established and their evidence cannot be thrown out as unreliable or tainted, merely because they are related with the deceased. This circumstance would not warrant mechanical rejection of their testimony. Evaluation with caution was needed, which has been done. The manner of assaults as described by them is also corroborated by medical evidence. The plea that improvements were made to being the ocular evidence in line with the medical evidence is clearly without substance. We have read the evidence and found that whatever was stated was by way of a clarification and certainty cannot be termed to the guilt on the appellants-accused. Therefore, the evidence of eye-witnesses was sufficient to fasten the guilt on the appellants-accused. The evidence of the prosecution is consistent during the cross examination. As such, the contention raised by the learned counsel for the appellants-accused has no force.

17. Learned counsel for the appellants contended that there was a delay in lodging the FIR. It was further contended on behalf of the appellants that the delay in

lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a colored version or exaggerated story. Learned Addl. G.A. refuted the contention. The incident took place at about 10:30pm on 18.07.1987. Dharmendra Pal PW5, who was present at the scene of occurrence, promptly reported the matter to the police at 12:50am on 19.07.1987. The distance between the police station and the place of incident is about 6kms. Dharmendra Pal PW5, who lodged the FIR, has stated in his cross examination that he started from his village to the police station Manglore at about 11pm and reached at about 11:45 or 12 pm in the night at Manglore where he wrote a report in a shop. Thereafter, he had given the tehrir report to the police station Manglore. The circumstances itself speak that the delay in lodging the FIR was under compelling circumstances. Considering this, we are of the view that there is no delay in lodging the FIR. The prompt FIR thus inspires confidence that it was not the outcome of any consultation or deliberation. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them as also the names of the eye witnesses, if any.

18. It was further contended that the FIR is ante-timed. The FIR was recorded much later than one shown in the document and as such the very genesis of the prosecution case belies and cannot be relied upon to convict the accused persons. It was further contended that there are cuttings at the bottom of written report ex.ka.7 as well in the panchanama. Learned Addl. G.A. refuted the contention. Perusal of the record reveals that the incident took place at about 10:30pm on 18.07.1987. The subscriber of the FIR started to write the report in the mid-night of 18th July, 1987 and when he came to know that the time of 12:50am would fall on the day of 19.07.1987, he then corrected it as 19.07.1987. It is apparent that even though a literate person commits such type of mistake. Therefore, the said cuttings are not material in this case. We are completely in agreement with the findings recorded by the trial court. There can be no other conclusion in this matter except that the FIR was recorded in time shown in the FIR.

19. Learned counsel for the appellants-accused contended that the sample of blood stained soil taken from the place of incident was not sent for chemical examination. It was further contended that the clothes taken by the I.O. in his possession have not been sent for chemical examination. Learned counsel for the appellants also tried to point out certain short-comings in the investigation. Learned Addl. G.A. refuted the contention. On due consideration of the submissions of the parties, we are of the view that non-examination of the blood stained soil and clothes by the chemical examiner does not affect the prosecution version.

Omissions which have been pointed out are insignificant. The consequence of such omission in the investigation is not necessary lead to discredit the main prosecution case if the prosecution evidence inspires confidence and circumstances lead to such a conclusion and the prosecution story rings true. It is well settled position of law that the testimony of the witnesses if found credible and cogent the defect on the part of the Investigating Officer cannot be taken into account. Even if the investigation is defective, that pales into insignificance when ocular testimony is found credible and cogent. In the case of a defective investigation the court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect. To do so would tantamount to play into the hands of the investigating officer if the investigation designedly defective. {Reliance placed in **Dhanaj Singh @ Shera and others Vs. State of Punjab 2004 (3) SCC P-654, Chhotu Vs. State of Maharashtra 1997 CRI.L.J 4394 (SC) and Karnel Singh Vs. State of M.P. 1995 CRL.L.J 4173**}. In the case in hand the ocular testimony of the witnesses are credible and cogent. It has further held by the Hon'ble Supreme Court in **Rotash Vs. State of Rajasthan 2007 AIR SCW 44** that :-

“32. The investigation was not foolproof but then defective investigation would not lead to total rejection of the prosecution case.

33. In *Visveswaran v. State* 2003 6 SCC 73, this has held:

Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable

doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved.”

In view of the foregoing discussion, we are of the view that the contention of the learned counsel for the appellants-accused has no force.

20. Learned counsel for the appellants contended that even though assuming that the evidence of the prosecution was found credible and cogent the appellant-Ratipal is entitled to get the benefit of doubt. It was further contended that there was no motive for Ratipal to cause injuries on the person of the deceased. The appellant-Ratipal was having a ‘lathi’ in his hand and here was no injury of ‘lathi’ in his hand and there was no injury of ‘lathi’ on the person of the deceased. Learned Addl. G.A. refuted the contention. It is in the evidence that the appellant-Ratipal alongwith Madan and Fulla appeared at the spot.

Ratipal was having a 'lathi' in his hand and he wielded it on the deceased during the course of incident. Thus, he shared the common intention to cause the murderous assault upon the deceased. Perusal of the post-mortem report reveals that the injury no.4 is abrasion which can be caused by 'lathi'. It is not disputed that appellant Ratipal is related to appellants Madan and Fulla. Ishmpal PW3 has also proved this fact. Assuming for the sake of argument that the prosecution has failed to prove the motive against the appellant-Ratipal. When the eyewitnesses to the occurrence consistently supported the prosecution case, the question of motive would have lost its importance. It is well settled that in order to bring home the guilt of an accused, it is not necessary for the prosecution to prove the motive. The existence of motive is only one of the circumstances to be kept in mind while appreciating the evidence adduced by the prosecution. If his evidence of the witnesses appears to be truthful and convincing, failure to prove the motive is not fatal to the case of the prosecution. It is also well settled that establishment of motive is not sine qua non for proving the prosecution case. It was held in **Yunus Vs. State of M.P. SCC 2003 (1) p/429:-**

“The prosecution in the present case has failed to prove the motive. Failure to prove motive for crime in our view is of no consequence. The role of the accused persons in the crime stands clearly established. The ocular evidence is very clear and convincing in this case. The illegal acts of the accused persons have resulted in the death of a young boy of 18 years. It is also well settled law that establishment of motive is not sine quo non for proving the prosecution case.”

The Hon'ble Apex Court has affirmed the above view in **Bhimapa Chandappa Hosamani Vs. State of Karnataka 2007 (1) SCC(Cri) 456).**

Therefore, the evidence of the prosecution cannot be discarded only on the ground that there was no motive. We are completely in agreement with the findings recorded by the trial court.

21. Learned counsel for the appellants further contended that since the appellant Ratipal was having a 'lathi' in his hand at the time of incident, hence the conviction of Ratipal under section 302 IPC with the aid of section 34 IPC is not justified in the facts and circumstances of the case. It was further contended that from the facts and circumstances of the case no offence under section 302/34 IPC is made out against the appellant Ratipal. Learned Addl. G.A. had supported the judgment of the trial court and contended that the appellant-Ratipal had participated in the commission of offence and as such the trial court had rightly convicted him under section 302/34IPC. To attract the provisions of section 34 IPC two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person, (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. To attract the applicability of section 34 IPC the prosecution is under obligation to establish that

there existed a common intention which requires a prearranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention presupposes prior concert, which requires a prearranged plan of the accused participating in an offence. Such preconcert or preplanning may develop on the spot or during the course of commission of offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. There is sufficient evidence to show that the appellant-Ratipal also participated in the crime. He also emerged alongwith other appellants in front of the deceased holding a 'lathi' in his hand; there was an injury of 'lathi' on the person of the deceased. Therefore, no inference can be drawn that the appellant Ratipal had not a common intention of causing death of the deceased or that he did not participate in that criminal act. All the appellants emerged at the spot and they caused murderous assault upon the deceased with the weapons which they were having and they have a common intention to cause the death of deceased.

22. In view of the foregoing discussion, we are completely in agreement with the findings recorded by that trial court. Therefore, we are of the view that the prosecution has established the guilt beyond

Reasonable doubt against the appellants. We find that the learned trial court has rightly convicted and sentenced the appellants and there is no infirmity in the judgment passed by the trial court.

23. Hence, the appeal is dismissed and the conviction and sentences awarded by the Trial court against the appellants are confirmed.

24. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S.Rawat, J.) (Rajeev Gupta, C.J.)

Dated 13th June, 2007

LSR